

**Central Valley Flood Protection Board Meeting
September 19, 2008**

**Staff Report
Amendments to California Code of Regulations Title 23:
Summary of Public Comments From June 12, 2008 Stakeholder Meeting**

Item

Consider comments provided by interested persons at the June 12, 2008, stakeholder meeting regarding proposed draft amendments to Title 23 of the California Code of Regulations. Provide direction to staff as needed.

Summary

On April 18, 2008, Deputy Attorney General Deborah Smith and Senior Staff Counsel Nancy Finch presented the Board with staff's proposed approach to making amendments to Title 23. At that time, Ms. Smith and Ms. Finch informed the Board that staff plans to proceed with amendments in three consecutive phases, or tiers, as follows:

TIER ONE:

- A.B. 5-Related Changes:
 - 1) Evidentiary Hearings:
 - §§12-15: Amend to be consistent with A.B. 5.
 - 2) Ex Parte Communications:
 - New § 5.1: Add to be consistent with A.B. 5.
 - 3) Delegations:
 - § 5: Amend to be consistent with A.B. 5.
 - § 109: Change "and" to "or;" Amend to be consistent with A.B. 5.
- Changes Related to Easements:
 - 1) Levees:
 - § 120(a)(5): Amend to allow the Board to require a larger easement under certain circumstances.
 - 2) Flood Control Works:
 - New §138: Add to allow the Board to define the limits of flood control works.
- Clean-up and Minor Technical Changes:
 - 1) Authority:
 - § 1: Change "Reclamation Board" to "Central Valley Flood Protection Board."

- 2) Intent:
 - § 3(4): Delete "and" following "protecting" and replace with "the."
 - § 3(5): Add section 408 to the last sentence.
- 3) Definitions:
 - § 4(a)(1): Adopted Plan of Flood Control - Delete "Article 5, Designated Floodways."
 - § 4(a)(3): Encroachment Lines - Clarify that boundary lines and encroachment lines are one and the same.
 - § 4(a)(4): Levee Toe - Change "extends ten (10) feet landward" to "extends at least ten (10) feet landward."
 - § 4(c): Board - Change "Reclamation Board" to "Central Valley Flood Protection Board."
- 4) Need for a Permit:
 - § 6(c): Change "General Manager" to "Executive Officer."
- 5) Endorsement by a Local Maintaining Agency:
 - § 7(d): Delete entire section, "This section does not apply where the department is the maintaining agency."
- 6) Applications:
 - § 8(b)(5): Add "property owner" as a person who must be identified on the application.
- 7) Tables and Exhibits:
 - Exhibit A: Application for Permit - Change "Reclamation Board" to "Central Valley Flood Protection Board" and from "General Manager" to "Executive Officer;" Delete paragraph 4.47.
 - Table 8.1: Regulated Streams and Nonpermissible Work Periods - Minor corrections to be determined.

TIER TWO:

- Major Technical Changes

TIER THREE:

- Identifying Obsolete Tools

On June 12, 2008, staff held a stakeholder meeting for the purpose of accepting public comments from interested persons regarding the proposed Tier One draft amendments (a full copy of the draft amendments that were posted for public comment is attached as Attachment A). Four people attended the meeting and provided several comments. Some of the public comments proposed that staff take a different approach than the approach outlined above and/or raised issues involving a determination of policy. Staff

seeks guidance from the Board on its preferred approach to these policy issues, which include the following:

Issues Raised at the Stakeholder Meeting

- 1) Consider drafting regulations to address a process for improvement projects that is separate and distinct from encroachment permits;
- 2) Consider allowing local districts to enforce against unpermitted encroachments on Board easements;
- 3) Consider allowing local districts to utilize Board easements for their own purposes;
- 4) Consider deleting section 123(f)(3), related to horizontal directional drilling:

§ 123. Pipelines, Conduits, and Utility Lines.

(f) Pipelines, conduits, and utility lines may be installed under a levee or stream channel by tunneling, jacking, or boring, if the following conditions are met:

- (3) If the installation is to be more than fifty (50) feet below the levee and the entire floodway and streambed, the board may waive the requirement for a permit provided a letter of intent is filed with the board prior to commencement of the project
- 5) Consider adding language to sections 120(a)(5) and 138, related to easements, requiring the Board to make a finding that the easement is "rationally related to the injury or interference." (Proposed draft sections 120(a)(5) and 138 are attached as a part of Attachment A).
 - 6) Consider deleting section 13(e)(3) (former section 13(c)(3)), related to expenses for out-of-town Board meetings:

§ 13. Evidentiary Hearings.

(e) (e) The board may hold a hearing or a partial hearing at any place within the state on its own initiative or on the request of the applicant. All hearings must be open to the public. The board President may designate a hearing officer. The board may require the applicant to pay all or part of the expenses of any hearing not located in the County of Sacramento, if the hearing is moved from Sacramento at the request of the applicant. These expenses may include, but are not limited to the following:

- (1) Traveling expenses of the board, officers, and employees of the board;
- (2) Expenses of stenographic reporting and transcribing evidence; and
- (3) A proportionate allowance, according to their usual rate of compensation, for the time of members, officers, and employees of the board required for the hearing.

It should be noted that there were several other comments made at the stakeholder meeting regarding various draft provisions. These comments will be reviewed and addressed in the final draft regulations, as appropriate.

Staff Recommendation

The staff recommendation is to proceed with the three-tier approach, as outlined above. Under this approach, staff plans to return to the Board with final drafts of the Tier One regulations for the Board's review and approval at its October meeting. In response to the specific public comments listed 1-6 above, staff recommends the following:

Public comments #1-3: consider these issues as a part of the Tier Three changes

Public comment #4: consider this issue as a part of the Tier Two changes

Staff makes these recommendations because the minor technical changes and amendments in response to A.B. 5 are already drafted in substantial part, while the above issues require further study and collaboration with interested parties before drafting may begin. Staff plans to continue working on the Tier Two and then Tier Three changes during the Tier One regulations process as time and resources permit.

Public comment #5: do not include the suggested language

Staff makes this recommendation because the suggested language requiring the Board to make a finding that the easement is "rationally related to the injury or interference" is either duplicative of the language that is currently contained in the proposed draft regulations, or essentially subsumed in them. The proposed draft amendment to section 120(a)(5) reads as follows: "The board may require an easement over a larger area and over any property when it is *foreseeable* that the proposed activities subject to a permit would be injurious to or interfere with the adopted plan of flood control." (Emphasis added.) Therefore, the Board may not require an easement pursuant to this section unless it finds that it is foreseeable that the activities authorized by a permit would be injurious to or interfere with the adopted plan of flood control.

Similarly, the proposed new section 138 enumerates the circumstances in which the Board may establish limits of the adopted plan of flood control or flood control works for purposes of establishing the area within the Board's jurisdiction. Therefore, the Board may not require an easement pursuant to section 138(b) unless one of these circumstances exists.

Public comment #6: delete section 13(e)(3) as suggested, except for overtime incurred during an out-of-town meeting

Staff makes this recommendation because it is reasonable to require the applicant requesting an out-of-town meeting to pay for overtime expenses for the time of members, officers, and employees of the board required for the hearing since it is an expense that

otherwise would not have been incurred (for example, additional staff time spent due to travel).

Attachments

- A. Draft Amendments to Title 23 that were posted for public comment prior to the June 12, 2008 stakeholder meeting**

Proposed Regulatory Changes to Title 23 Waters

Amend §120(a)(5) Levees.

Existing § 120(a)(5)

The applicant shall provide the board with a permanent easement granting the Sacramento and San Joaquin Drainage District all flood control rights upon, over, and across the property to be occupied by the proposed flood control works. The easement must include the area within the proposed floodway, the levee section, and the area at least ten (10) feet in width adjacent to the landward levee toe if the area is not presently encumbered by a board easement. The board may require an easement over a larger area and over any property when it is foreseeable that the proposed activities subject to a permit would be injurious to or interfere with the adopted plan of flood control.

This language is added to allow the board to require any easement that is necessary to regulate the flood control interest of the Board in accordance with Title 23. Under this change, easements may be required for maintenance, flowage, excavation or other reasons to the extent such easements are necessary to prevent the proposed activities subject to a permit from resulting in an effect that is injurious to or interferes with the adopted plan of flood control. The board may require the applicant to obtain easements over property the applicant may not own.

Add new § 138. Identification of Limits of Flood Control Works

§ 138 Identification of Limits of Flood Control Works.

(a) The board may identify the limits of the adopted plan of flood control or flood control works for purposes of establishing the area within the Board's jurisdiction that it actively regulates when:

1. The existing levee toe has become unidentifiable due to erosion or the placement of fill material into, onto, or adjacent to the existing levee.

2. Features or facilities necessary to the functioning of flood control are proposed to be added that may interfere with the integrity or proper functioning of the adopted plan of flood control.

3. The point of intersection of the levee slope and natural ground cannot readily be determined, therefore, the existing levee toe cannot otherwise be defined in accordance with Title 23 Cal Code Regs. Section 4(s).

(b) Where the board defines the limits of the flood control project works pursuant to this section, the applicant shall provide the board with all necessary easements for the defined area described in section 138(1).

This section is added to give the board the ability to define the limits of the Board's regulatory interest for the purposes of determining the easement area when necessary in accordance with the Board's jurisdiction described in Section 8710 of the Water Code and Title 23. For example, Section 138(a)(1) would likely address a situation where an applicant requests permissions from the Board to tie into a levee regulated by the board by means of the placement of fill, such as with the River Island's project. Section 138(2) would address the situation in which the board must define the easement for purposes of installation of a pump or other flood features or facilities necessary to improve the functioning of the flood control system. Section 138(3) would likely address situations in which the placement of dredge or other material has obscured or buried the original intersection of the project levee with the natural ground, such as on the west bank of the Sacramento River adjacent to the city of West Sacramento.

Clean-up and Minor Technical Changes

APPENDIX A

STATE OF CALIFORNIA
THE RESOURCES AGENCY

~~THE RECLAMATION BOARD~~
THE CENTRAL VALLEY FLOOD PROTECTION BOARD

1416 Ninth Street, Room 455-8
Sacramento, California 95814
Telephone: (916) 653-5726
FAX (916) 653-5805

GENERAL INFORMATION
REGARDING APPLICATIONS FOR ENCROACHMENT PERMITS

These instructions will provide you with information on how to prepare your application for a ~~Reclamation Board~~ Central Valley Flood Protection Board encroachment permit.

Approval by the Board is required for projects or uses which encroach into rivers, waterways, and floodways within and adjacent to federal and State authorized flood control projects and within designated floodways adopted by the Board. You must obtain Board approval before you begin certain uses or construction work on any proposed project within these areas.

The Board exercises jurisdiction over the levee section, the waterward area between project levees, a 10-foot-wide strip adjacent the landward levee toe within 30 feet of the top of the banks of unleveed project channels, and within designated floodways adopted by the Board. Activities outside of these limits which could adversely affect the flood control project are also under Board jurisdiction. Maps of designated floodways are available for inspection at the Board's office in Sacramento, city and county planning or public works departments, and county recorders' offices. Questions relative to proposed projects or uses which may require Board approval should be directed to ~~The Reclamation Board~~ The Central Valley Flood Protection Board, 1416 Ninth Street, Room 455-8, Sacramento, California 95814, or telephone (916) 653-5726.

Four copies of the completed application and drawings, one completed copy of the Environmental Questionnaire, and any other environmental documents must be submitted. The application must be made on forms provided by the Board and must contain the following information:

1. A concise description of the proposed project or use.

2. The county, section, township, range and the base and meridian in which the proposed project or uses are located.
3. The name, address, telephone number, and FAX number (if any) of the applicant.
4. An endorsement must be obtained from the reclamation, levee, or flood control district responsible for levee maintenance. Special conditions may be added to the permit at the request of the district. If the maintaining district delays or declines to endorse the application, it may be submitted to the Board without endorsement with a written explanation as to why the application was not endorsed by the maintaining district.
5. A current list of the names and addresses of all adjacent property owners.
6. If applicable, provide the name and address of the Lead Agency responsible for preparing environmental documentation regarding the proposed project as required by the California Environmental Quality Act of 1970. The environmental questionnaire provided by the Board must be completed and submitted as part of your application.
7. Four copies of exhibits and drawings depicting the project or use.
8. At least two color photographs (polaroids or snapshots are acceptable) showing different views of the project site. Include captions which explain what the photograph is depicting.
9. The name and address of the owner of the proposed project or use if different from the person filing the application.

You should include with your application any additional information that would be helpful in evaluating your proposed project or use.

The application must be signed and dated.

Your completed application may be mailed or delivered in person to:

~~The Reclamation Board~~
The Central Valley Flood Protection Board
Attention: Floodway Protection Section
1416 Ninth Street, Room 455-8
Sacramento, California 95814

The Board has adopted standards for work which encroaches in to the area within its jurisdiction. Copies of the standards are available upon request. A typical levee cross section and terminology are presented in Exhibit 1.

Minimum Requirement and Format for Drawings

1. The following information is required to evaluate the work described in your application. Additional information may be required depending upon the nature of the project.
 - A. The title block of each sheet should identify the proposed activity and include the name of the applicant, number of the sheet, total number of sheets in the set, and date the drawing was prepared.

- B. The names of the stream, river mile, scale, north arrow, datum reference, and other information as required.
 - C. The exact location of the proposed project in relation to identifiable landmarks.
 - D. Plan and elevation views of the proposed project or use and the proximity of the proposed project or use in relation to existing facilities, property lines, levees, streams, etc.
 - E. Drawings of levee cross sections or profiles must indicate the elevations of levee crowns, toes, low-water surface, and design flood plan. These drawings should include horizontal and vertical scales and must be referenced to a known elevation datum.
2. Please use the following format:
- A. Prepare the drawings on 8-1/2-by-11-inch sheets (when possible) in accordance with the general format depicted in Exhibits 2, 3, and 4.
 - B. Allow a 1-inch binding margin on the top side of each sheet.
 - C. Because additional copies of the drawings may have to be reproduced photographically, color shadings cannot be used. Drawings must show shading as dot shading, cross hatching, or similar graphic symbols.

Application Processing

Upon receipt of an application, a general review is made to determine if it is adequately complete to begin processing. If the application is found to be complete, it will be assigned a number and a letter will be sent to the applicant acknowledging receipt of the application. The Board will send a notice of the pending application to the adjacent property owners. If, during the review process, the application is found to be incomplete, it will be returned or the applicant will be advised by letter of the deficiencies in the application. If these deficiencies are not corrected within a reasonable time limit, processing of the application will be terminated.

The applicant may be notified of a need for additional studies.

A copy of the application is sent to the U.S. Army Corps of Engineers for review and comment.

The Board staff performs some level of environmental review of the potential impacts of the proposed project or use.

The project or use described in the permit issued on each approved application is subject to 12 general conditions. A number of special conditions may be added to the approved permit depending on the nature of the proposed security.

~~The majority of applications filed are approved by the Board's General Manager. If the General Manager denies an application, the applicant has the right to appeal to the Board. Request for Board consideration should be in writing and should include a statement of facts as to why an appeal is being made to the Board.~~

Applications which must be considered by the Board are placed on the agenda of the next regular Board meeting. The applicant and all interested parties are notified of the meeting and may appear and present their views to the Board for its consideration. After an application has been approved by the Board, any requests for revisions to the proposed or completed project which have not been approved by the Board must be submitted in writing to the Board for approval. Revised applications are processed in the same manner as new applications.

Acceptance of a Permit

You must notify the Department of Water Resources ten days before construction begins by mailing the pre-addressed start card furnished by the Board when the permit is issued. This card will contain the current address and telephone number of the Department of Water Resources' Flood Project Inspection Section which provides inspection services on behalf of the Board. The beginning of any work described in the permit constitutes acceptance by the applicant that work will be done in compliance with the general and special conditions listed in the permit.

Inquiries about procedures or other details may be made in person or correspondence to ~~The Reclamation Board~~ The Central Valley Flood Protection Board, Attention: Floodway Protection Section, 1416 Ninth Street, Room 455-8, Sacramento, California 95814; by FAX at (916) 653-5805; or by calling (916) 653-5726. Please include the Board's application number when inquiring about an application.

Clean-up and Minor Technical Changes

§ 1 Authority.

These regulations are promulgated by the ~~Reclamation Board~~ Central Valley Flood Protection Board pursuant to Water Code sections 8571 and 8608.

§ 3. Intent.

The State has a primary interest in:

- (1) Adequacy protecting lands subject to overflow;
- (2) Confining the waters of rivers, tributaries, bypasses, overflow channels, and basins within their respective boundaries;
- (3) Preserving the welfare of residents and landowners;
- (4) Maintaining and protecting ~~and~~ the banks of the Sacramento and San Joaquin Rivers, their tributaries, bypasses, overflow channels, and basins and;
- (5) Good and sufficient levees and embankments or other works of flood control and reclamation, to adequately protect lives and property from floods

The regulations are also intended to comply with the board's obligations to the U.S. Army Corps of Engineers pursuant to numerous assurance agreements, Corps Operation and Maintenance Manuals, 33 C.F.R. section 208.10 and 33 U.S.C. 408.

§ 4. Definitions

- (a) Adopted Plan of Flood Control. "Adopted Plan of Flood Control" means a flood control or reclamation strategy for a specific area that has been adopted by the board or the legislature and includes the following:
 - (1) In the case of project flood channels without levees, it means the natural stream channel and overbank area at design flood levels; ~~(see Article 5, Designated Floodways);~~
 - (2) In the case of project channel with levees, it means the area between and including the project levees, and includes:
 - (A) Additional area outside of the project levees where encroachments could affect the integrity, functioning or maintenance of the works (generally ten (10) feet landward of the levee tow);
 - (B) Any flowage areas that are part of the federal or state flood control project; and
 - (C) Areas where there are flowage easements; and
 - (3) In the case of designated floodways, it means the area between the encroachments lines. For purposes of this section, boundary lines and encroachment lines are interchangeable terms.
 - (4) Where levees are involved, the "Adopted Plan of Flood Control" extends at least ten (10) feet landward from the levee toe except where an operation and maintenance manual furnished pursuant to 33 C.F.R. 208.10 or the real property rights acquired by the board specifically provide otherwise.
- (b) Berm. "Berm" means the strip of ground between the waterward levee toe and the top of the bank of a low water channel.

- (c) Board. "Board" means The ~~Reclamation Board~~ Central Valley Flood Protection Board of the Resources Agency of the State of California as provided in Water Code section 8521.

§ 6. Need for a Permit

- (a) Every proposal or plan of work, including the placement, construction, reconstruction, removal, or abandonment of any landscaping, culver, bridge, conduit, fence, projection, fill, embankment, building, structure, obstruction, encroachment or works of any kind, and including the planting, excavation, or removal of vegetation, and any repair or maintenance that involves cutting into the levee, wholly or in part within any area for which there is an adopted plan of flood control, must be approved by the board prior to the commencement of work.
- (b) Permits may be required by the board for existing structures that predate permitting or where it is necessary to establish the conditions normally imposed by permitting. The circumstances include those where responsibility for the encroachment has not been clearly established or ownership and use have been revised.
- (c) Every proposal or plan of work described in subdivision (a), but located outside an area over which there is an adopted plan of flood control, must be submitted to the board for approval prior to the commencement of work if it is foreseeable that the plan of work could be injurious to or interfere with the successful execution, functioning, or operation of any facilities of an adopted plan of flood control or of a plan under study. If in the ~~judgement~~ judgment of the ~~General Manager~~ Executive Officer, the plan of work is determined to be injurious to or interfere with an adopted plan of flood control or of a plan under study, the plan of work would be subject to requirements of this division.
- (d) Permits are not required for maintenance activities as defined in article 2, section 4 of this title.
- (e) The ~~General Manager~~ Executive Officer may waive the requirements for a permit for minor alterations within an adopted plan of flood control that would not be injurious to the adopted plan of flood control.

§ 7. Endorsement by Local Maintaining Agency

- (a) Prior to submitting an encroachment permit application to the board, the application must be endorsed by the agency responsible for maintenance of levees within the area of the proposed work, such as a reclamation district, drainage district, flood control district, levee district, county, or city. Endorsement or denial of the application by the maintaining agency does not preclude the board from either approving or denying the application. If endorsement by the maintaining agency is declined or is unreasonably delayed, the application may be submitted to the board for consideration, along with a satisfactory explanation for lack of an endorsement.

- (b) For the purposes of this section "endorsement" means conceptual plan approval, which may include recommended permit conditions of the local maintaining agency.
- (c) Applicants shall be advised by the board that permission for an encroachment may also be required from the local maintaining agency.
- (d) ~~This section does not apply where the department is the maintaining agency.~~

§ 8. Applications

- (a) All applications for approval must be on forms provide by the board. The board provides a standard application for most projects. When available, a special joint permit application may be used by the applicant. Applications to the board must be typewritten or in legible hand writing in ink and signed by or on behalf of the applicant. Applicants must furnish copies of other material as may be needed by the board and its staff to adequately determine the exact nature of the proposed work and its effect upon any project facilities or adopted plan of flood control. Applications and all associated material must be filed in quadruplicate (4 copies) with the office of the board. A copy of the standard application form is found in Appendix A. Applicants should contact the board if they believe their project may be eligible for a joint permit application form.
- (b) Information furnished to the board must include:
 - (1) A description of the proposed work, together with a statement of the dates the planned construction will be initiated and completed.
 - (2) A completed copy of the Environmental Assessment Questionnaire that accompanies the application form from the board (See Appendix A) and a copy of any draft and final environmental review document prepared for the project, such as an initial study, environmental assessment, negative declaration, notice of exemption, or environmental impact report. For any reasonably foreseeable significant environmental impacts, mitigation for such impacts shall be proposed.
 - (3) Complete plan and specification showing the proposed work, including a location map showing the site of the work with relation to topographic features; a plan view of the area; and adequate cross sections through the area of the proposed work. The plans must be drawn to scale and refer to National Geodetic Vertical Datum (NGVD), or other known datum. The plans must also indicate any project features such as levees and/or channels, roads, or other structures, and must show river mile or levee mile references. The dimensions of any proposed or existing fills, excavations, and construction must be given.
 - (4) Additional information, such as geotechnical exploration, soil testing, hydraulic or sediment transport studies, biological surveys, environmental surveys and other analyses may be required at any time prior to board action on the application.
 - (5) The names and addresses of all landowners of the property on which the project is located and of all landowners adjacent to the property on which the project is located.
 - (6) The Board may waive minor variations in an application.

Proposed Regulatory Changes to Title 23 Waters

Amend §120(a)(5) Levees.

Existing § 120(a)(5)

The applicant shall provide the board with a permanent easement granting the Sacramento and San Joaquin Drainage District all flood control rights upon, over, and across the property to be occupied by the proposed flood control works. The easement must include the area within the proposed floodway, the levee section, and the area at least ten (10) feet in width adjacent to the landward levee toe if the area is not presently encumbered by a board easement. The board may require an easement over a larger area and over any property when it is foreseeable that the proposed activities subject to a permit would be injurious to or interfere with the adopted plan of flood control

This language is added to allow the board to require any easement that is necessary to regulate the flood control interest of the Board in accordance with Title 23. Under this change, easements may be required for maintenance, flowage, excavation or other reasons to the extent such easements are necessary to prevent the proposed activities subject to a permit from resulting in an effect that is injurious to or interferes with the adopted plan of flood control. The board may require the applicant to obtain easements over property the applicant may not own.

Add new § 138. Identification of Limits of Flood Control Works

§ 138 Identification of Limits of Flood Control Works.

(a) The board may identify the limits of the adopted plan of flood control or flood control works for purposes of establishing the area within the Board's jurisdiction that it actively regulates when:

1. The existing levee toe has become unidentifiable due to erosion or the placement of fill material into, onto, or adjacent to the existing levee.
2. Features or facilities necessary to the functioning of flood control are proposed to be added that may interfere with the integrity or proper functioning of the adopted plan of flood control.
3. The point of intersection of the levee slope and natural ground cannot readily be determined, therefore, the existing levee toe cannot otherwise be defined in accordance with Title 23 Cal Code Regs. Section 4(s).

(b) Where the board defines the limits of the flood control project works pursuant to this section, the applicant shall provide the board with all necessary easements for the defined area described in section 138(1).

This section is added to give the board the ability to define the limits of the Board's regulatory interest for the purposes of determining the easement area when necessary in accordance with the Board's jurisdiction described in Section 8710 of the Water Code and Title 23. For example, Section 138(a)(1) would likely address a situation where an applicant requests permissions from the Board to tie into a levee regulated by the board by means of the placement of fill, such as with the River Island's project. Section 138(2) would address the situation in which the board must define the easement for purposes of installation of a pump or other flood features or facilities necessary to improve the functioning of the flood control system. Section 138(3) would likely address situations in which the placement of dredge or other material has obscured or buried the original intersection of the project levee with the natural ground, such as on the west bank of the Sacramento River adjacent to the city of West Sacramento.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 23. WATERS
DIVISION 1. RECLAMATION BOARD
CHAPTER 1. ORGANIZATION, POWERS AND STANDARDS
ARTICLE 7. REVIEW RIGHTS

This database is current through 4/11/08, Register 2008, No. 15

§ 109. Right of Review of Delegated Authority.

Any person or public agency having an interest in a decision made by the Director of the department or the ~~Executive Officer~~ General Manager of the board pursuant to any delegation by the board, including those delegations in Section 5, ~~Resolution No. 94-15 dated September 16, 1994, Resolution No. 06-08 dated April 21, 2006, and or~~ any other delegation of authority has the right to review by the board in accordance with the requirements of section 12. Adversely affected persons have the right to present arguments to the board in person or by a designated representative at a regularly scheduled board meeting.

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<General Materials (GM) - References, Annotations, or Tables>

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8609 and 8710, Water Code.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 23. WATERS
DIVISION 1. RECLAMATION BOARD
CHAPTER 1. ORGANIZATION, POWERS AND STANDARDS
ARTICLE 3. APPLICATION PROCEDURES
This database is current through 4/11/08, Register 2008, No. 15

§ 15. Bases for Denial of Applications.

The board may deny a permit for any of the following reasons:

(a) If the proposed work could:

- (1) Jeopardize directly or indirectly the physical integrity of levees or other works;
- (2) Obstruct, divert, redirect, or raise the surface level of design floods or flows, or the lesser flows for which protection is provided;
- (3) Cause significant adverse changes in water velocity or flow regimen;
- (4) Impair the inspection of floodways or project works;
- (5) Interfere with the maintenance of floodways or project works;
- (6) Interfere with the ability to engage in floodfighting, patrolling, or other flood emergency activities;
- (7) Increase the damaging effects of flood flows; or
- (8) Be injurious to, or interfere with, the successful execution, functioning, or operation of any adopted plan of flood control.
- (9) Adversely affect the State Plan of Flood Control.

(b) When the board is the lead agency under CEQA, and the proposed encroachment could result in potential and unmitigated significant environmental effects, including cumulative environmental effects.

(c) When the board is a responsible agency under CEQA, and the CEQA document is inadequate.

(d) If the applicant fails to supply information deemed necessary by the board for application purposes, including the names of all adjacent landowners.

(e) If the proposed work does not meet board standards contained in article 8.

(f) If there has been a failure by the applicant (or persons associated with the applicant through an agreement or agency relationship) to substantially comply with permit conditions on prior related permits or if there has been work performed without a permit and that work is not the subject of the pending permit application where the applicant has not supplied reasonable and convincing assurances that compliance with the board's regulations will be achieved.

<General Materials (GM) - References, Annotations, or Tables>

Deleted: 1

Note: Authority cited: Section 8571, Water Code. Reference: Section 65943, Government Code; Sections 21002 and 21081, Public Resources Code; Sections 8608, 8610.5, 8710 and 8723, Water Code.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 23. WATERS
DIVISION 1. RECLAMATION BOARD
CHAPTER 1. ORGANIZATION, POWERS AND STANDARDS
ARTICLE 3. APPLICATION PROCEDURES

This database is current through 4/11/08, Register 2008, No. 15

§ 13. Evidentiary Hearings.

(a) An evidentiary hearing shall be held for any matter that requires the issuance of a permit.

Hearings shall be held on an application in the following circumstances:

(1) Upon written request of the applicant;

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(2) When approval requires a variance to the board's standards;

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(3) When any person files a written protest conforming to the requirements of section 12 and requests a hearing;

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(4) When the authority to approve the activity has not been delegated to the General Manager;

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(5) Upon the board's own motion.

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(b) The requirement for an evidentiary hearing may be satisfied by placing the permit matter on the board's consent calendar in accordance with Section 13.2

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(c) Evidentiary hearings shall be conducted pursuant to the procedures in section 13.1.

(b) (d) The applicant and other parties may request in writing that the board provide a copy of any document, not exempt from disclosure under the Public Records Act, beginning at Government Code section 6251, that is relevant to any proceeding. The board may charge a reasonable fee for each copy.

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(e) (e) The board may hold a hearing or a partial hearing at any place within the state on its own initiative or on the request of the applicant. All hearings must be open to the public. The board President may designate a hearing officer. The board may require the applicant to pay all or part of the expenses of any hearing not located in the County of Sacramento, if the hearing is moved from Sacramento at the request of the applicant. These expenses may include, but are not limited to the following:

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(1) Traveling expenses of the board, officers, and employees of the board;

(2) Expenses of stenographic reporting and transcribing evidence; and

(3) A proportionate allowance, according to their usual rate of compensation, for the time of members, officers, and employees of the board required for the hearing.

(f) If the President designates a hearing officer, the board shall ratify the decision of the hearing officer at the next available board meeting following the hearing officer's decision. The decision shall be considered final at the time the board ratifies the hearing officer's decision.

(d) (g) Written notice of the hearing shall be mailed to the applicant and each other party at least ten (10) days prior to the date of the hearing. The notice shall include the following:

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(1) The name and number assigned to the application;

(2) A description of the application and its proposed location;

(3) The date, time, and place at which the application will be heard;

(4) A statement that the hearing will be governed by this Article, and that a copy of the governing procedures will be provided to the applicant upon request;

(5) A statement that Chapter 5 of the Administrative Procedure Act (commencing with Section 11500) shall not apply to the proceeding; and

(6) A statement that if the applicant or the applicant's witness does not proficiently speak or understand English, the applicant may request language assistance by contacting the board and making such request within a reasonable amount of time prior to the hearing to allow appropriate arrangements to be made. The President or appointed hearing officer may direct the applicant to pay for the cost of the interpreter.

(e) (h) Applicants shall be notified of the staff recommendations on the application at least seven (7) days prior to the hearing, unless this period is waived by the applicant. Adjacent landowners shall also be notified of staff recommendations at least seven (7) days prior to the hearing if they have responded in writing to the notice sent pursuant to section 9(b) of this article. Protestants shall be notified of the staff recommendations at least seven (7) days prior to the hearing.

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(i) Notice to an applicant's representative as designated on the completed permit application form shall constitute notice to the applicant.

(f) (i) The board President or appointed hearing officer may implement additional administrative procedures for the conduct of hearings and related proceedings. This authority may be redelegated to the General Manager.

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<General Materials (GM) - References, Annotations, or Tables>

Note: Authority cited: Section 8571, Water Code and Section 11400.20, Government Code.
Reference: Sections 6253, ~~and 11125, and 11425.10, Government Code;~~ Government Code;
and Sections 8610.5, 8710, 8730.2, 8731, 8732, 8732.5, 8734 and 8735, Water Code.

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Title 23, Article 1, Chapter 1, Article 3, New Section 13.2

§ 13.2. Consent Calendar.

(a) Unless otherwise provided in this Article, the procedures set forth in Article 3 of these regulations pertaining to permit applications, including staff reports, staff recommendations, resolutions, and voting, shall apply to the consent calendar procedure.

(b) Any matter for which there are no speakers in opposition, including permit matters, may be placed on the board's consent calendar in accordance with Section 13.2, unless one of the following occurs to remove the item from the consent calendar:

- (1) Upon request by the applicant, any member of the public, or any board member;
- (2) When any interested party files a written protest conforming to the requirements of section 12 and requests a hearing;
- (3) When approval requires a variance to the board's standards;
- (4) Upon the board's own motion.

(c) All items included in the consent calendar shall be considered by the board in one action. Public testimony shall be deemed waived. If the item is not removed from the consent calendar, any recommended conditions contained in the staff report and resolution, if one is prepared, shall be deemed approved by the board.

(d) Consent calendar items shall only be voted on if the board accepts the staff recommendation as stated in the staff report with no substantial changes. Otherwise, the item must either be removed from the consent calendar for discussion and action at the same meeting or continued to a subsequent board meeting.

(e) If an item is removed from the consent calendar, then the public shall have the right to present testimony and evidence in accordance with Section 13.1 of these regulations.

Note: Authority cited: Section 8571, Water Code and Section 11400.20, Government Code.
Reference: Section 11425.10, Government Code; and Section 8610.5, Water Code.

Title 23, Article 1, Chapter 1, Article 3, New Section 13.1

§ 13.1. Conduct and Order of Evidentiary Hearing Proceedings.

(a) It is the purpose of this section to incorporate and implement the informal hearing procedures and Administrative Adjudication Bill of Rights in Chapter 4.5 of the Administrative Procedure Act (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, which require notice and an opportunity to be heard, including the opportunity to present and rebut evidence. Chapter 5 of the Administrative Procedure Act (commencing with section 11500) does not apply to evidentiary hearings before the board.

(b) The board's evidentiary hearings on permit applications shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unnecessary delay.

(c) The board's evidentiary hearing on a permit application shall be held in open session. Unless the President or appointed hearing officer directs otherwise, the hearing shall proceed in the following order:

(1) The Executive Officer or his/her designee shall make a presentation to the board identifying the application, describing the project, and summarizing the staff recommendation, including the proposed findings, proposed conditions, and written correspondence received prior to the hearing.

(2) The public testimony portion of the public hearing shall proceed in the following order:

(i) Persons or their representatives desiring to state their views on the application shall have the opportunity to do so as follows:

(A) The applicant;

(B) Other persons supporting the application;

(C) Persons opposing the application;

(D) Other persons.

(ii) The President or appointed hearing officer may allow rebuttal testimony by the applicant.

(iii) The Executive Officer or his/her designee may respond to and comment, as appropriate,

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on the testimony presented by any previous speaker.

(3) The President or appointed hearing officer may close the public testimony portion of the hearing when a reasonable opportunity to present all questions and points of view has been allowed.

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(4) Board members may ask questions at any time following any person's presentation.

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(5) At the conclusion of the public testimony portion of the public hearing, the Executive Officer or his/her designee may propose to change the staff recommendation or the board may propose to add, delete, or modify the conditions contained in the staff recommendation. The applicant and the Executive Officer or his/her designee shall have an opportunity to comment on any proposed change.

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(6) The board shall vote on a permit application in accordance with Water Code section 8560.

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(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. The President or appointed hearing officer may take official notice of such facts as may be judicially noticed by the courts of this state. Unduly repetitious or irrelevant evidence shall be excluded upon order by the President or appointed hearing officer.

(e) The President or appointed hearing officer may establish reasonable time limits for presentations. The time limits shall be made known to all speakers prior to any hearing. The President or appointed hearing officer may require individuals to consolidate their comments to avoid repetition.

(f) In order for audio, visual, or audio-visual materials to be considered by the board, they must be submitted to staff in the course of review of the application or shown in full at the public hearing. The presentation of these materials shall occur within the time limit allocated to speakers.

(g) The speaker must submit all materials presented at the hearing to the Executive Officer or his/her designee for inclusion in the record of the proceeding. Any speaker who, as part of his or her presentation, exhibits models or other large-sized materials may satisfy this requirement by:
(1) submitting accurate reproductions or photographs of the models or other large materials and
(2) agreeing in writing to make such materials available to the board if necessary for any administrative or judicial proceeding.

(h) All decisions of the board relating to permit applications shall be accompanied by written conclusions setting forth the factual and legal basis of the decision based upon the record. The written conclusions shall include all elements identified in Water Code section 8610.5(c)(1)-(4).

(1) For purposes of this section, a resolution adopted by the board at the hearing shall be deemed to satisfy the requirement for written conclusions, including any modifications made to the resolution at the hearing.

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(2) In addition, unless otherwise specified at the time of the vote, an action taken consistent with the staff recommendation shall be deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report, including any modifications made to the staff report at the hearing.

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(i) If the board action is substantially different than that recommended in the staff report and/or the resolution, the board may direct staff to return at a subsequent board meeting with a revised resolution and/or proposed revised written conclusions that reflect the action of the board. Revised written conclusions may be placed on the consent calendar and do not re-open the hearing. Public comment is restricted to whether the revised written conclusions reflect the action of the board. Any proposed written conclusions shall only be effective if concurred in by at least four members of the board. Board members who were not present for the original vote may only vote on the revised written conclusions if they have familiarized themselves with the record of proceedings. If the board does not accept the revised resolution or proposed revised written conclusions submitted by the Executive Officer, the board can either make such changes as it determines are appropriate and adopt the findings at that meeting or direct the Executive Officer to prepare further proposed written conclusions and submit them to the board at the next meeting. The board's decision is deemed final at the time of the initial vote on the application, not the time that the revised written conclusions are adopted.

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Deleted: Only those board members who voted on the initial application decision may vote on whether or not to adopt the proposed written conclusions.

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(j) If the applicant requests language assistance prior to the hearing, the board shall provide language assistance in accordance with Article 8 (commencing with Section 11435.05) of the Administrative Procedure Act. The President or appointed hearing officer may direct the applicant to pay for the cost of the interpreter. The determination whether to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the applicant in need of the interpreter to pay. If the request for an interpreter is not made within a reasonable amount of time prior to the hearing to allow appropriate arrangements to be made, the hearing may be continued to a subsequent meeting.

(k) The board may vote to continue all or part of the hearing to a subsequent meeting. Notice of the subsequent hearing shall be distributed in accordance with Section 13 of these regulations. A continuance of part of a hearing does not reopen the entire hearing.

Note: Authority cited: Section 8571, Water Code and Section 11400.20, Government Code.
Reference: Section 11425.10, Government Code; and Section 8610.5, Water Code.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 23. WATERS
DIVISION 1. RECLAMATION BOARD
CHAPTER 1. ORGANIZATION, POWERS AND STANDARDS
ARTICLE 2. DEFINITIONS AND DELEGATIONS

This database is current through 4/11/08, Register 2008, No. 15

§ 5. Delegations.

(a) For the purposes of this division, all duties of the board, ~~including the review and approval of all encroachment permit applications;~~ are hereby delegated to the ~~Executive Officer~~ General Manager, with the exception of the following:

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(1) ~~Matters that require the issuance of a permit. Applications for which written protests have been filed;~~

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(2) ~~Applications which require a variance from the board's standards;~~

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(3) ~~(2) Controversial matters applications,~~ based on substantial public concern;

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(4) ~~(3) Applications~~ Matters involving significant policy considerations;

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(5) ~~(4) Applications~~ Matters requiring the preparation of an environmental impact report by the board.

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(6) ~~(5) Applications~~ Matters involving residential developments, as defined in Section 113.

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(7) ~~(6) Applications for~~ Matters involving surface mining except extensions of time for existing operations.

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(8) ~~Applications for bicycle trails on levees.~~

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(b) The ~~Executive Officer~~ General Manager shall have authority to approve notices of exemption, initial studies ~~and negative declarations,~~ notices of preparation, requests for shortened review, draft environmental impact reports, and notices of determination prepared pursuant to CEQA. The ~~Executive Officer~~ General Manager may conduct public hearings on any matter identified in this subsection. The board may, by resolution, delegate other duties and responsibilities to the ~~General Manager~~ ~~Executive Officer~~, the Director of the department, or others.

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(c) The ~~Executive Officer~~ General Manager, by written order, may redelegate these authorities to the Chief Engineer, ~~or Board Counsel, or the Department Program Manager for Flood Control Activities under Central Valley Flood Protection Board~~ Reclamation Board authority.

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<General Materials (GM) - References, Annotations, or Tables>

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8581, 8610.5, and 8710, Water Code.

Title 23, Article 1, Chapter 1, Article 2, New Section 5.1

§ 5.1. Ex Parte Communications.

(a) Ex parte communications concerning matters, other than purely procedural matters, under the board's jurisdiction that are subject to a vote are prohibited. However, if such a prohibited communication occurs, any board member or appointed hearing officer who receives the ex parte communication shall disclose the content of the communication on the record.

(b) "Matters under the board's jurisdiction" means permit actions, enforcement actions, and other quasi-judicial matters for which an application has been filed with the board. It shall not mean quasi-legislative actions, including topics of general concern which are not related to a specific application, such as the adoption of an overall policy regarding flood protection or general policy concerns which may be raised at task force, subcommittee, or other meetings. For enforcement proceedings pursuant to Article 4 of these regulations, the prohibition shall attach after the Executive Officer or Chief Engineer either issues an order to stop work or mails a notice of violation, whichever is sooner. After the board or appointed hearing officer votes on an application and any opportunity for reconsideration pursuant to Article 4.1 of these regulations has expired, the matter is no longer a "matter under the board's jurisdiction."

(c) "Procedural matters" include, but are not limited to, communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such non-substantive information.

(d) When the ex parte rules of this section attach, any board member or appointed hearing officer may only take a field trip to the site of a proposed project or a pending enforcement action if ten (10) days' advance public notice is given stating the time, location, and intended scope of the field trip.

(e) Any required disclosure under this section shall occur prior to or at the same time that the board or appointed hearing officer considers the matter that is the subject of the ex parte communication.

(f) Compliance with the disclosure requirement regarding the receipt of a ~~written~~ ex parte communication shall be accomplished by sending a copy of the written communication and any response to the communication to the Executive Officer.

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(g) Compliance with the disclosure requirement regarding the receipt of an oral ex parte communication shall be accomplished by submitting a memorandum to the Executive Officer for inclusion into the record of the matter that is the subject of the ex parte communication.

(h) The memorandum required by paragraph (g) shall include the substance of the communication, any response by the recipient board member or appointed hearing officer, and the identity of each person from whom the recipient board member or appointed hearing officer received the communication.

(i) When disclosure is required, the Executive Officer, board member, or appointed hearing officer shall notify the interested party as soon as practicable that a full disclosure of the ex parte communication shall be entered in the board's record.

Note: Authority cited: Section 8571, Water Code. Reference: Section 8578, Water Code.

Proposed Changes To Table 8.1

TABLE 8.1-REGULATED STREAMS AND NON-PERMISSIBLE WORK PERIODS

STREAM TITLE	COUNTY-LIMITS	FLOOD SEASON	PROPOSED CHANGE
Banta Carbona Intake Canal	San Joaquin County	2	Add to Table
Bear Creek	San Joaquin County, up to Jack Tone Road	2	Change Limit Description
Bear Creek	Shasta County, reach within Designated Floodway of the Sacramento River	2	Change Limit Description
Cache Creek	Yolo County, Yolo Bypass to 1/2 mile west of I-5	2	Change Limit Description
Cameron Slough	Fresno County, within the Kings River Designated Floodway	1	Change Limit Description
Chowchilla River	Merced, Madera, and Mariposa Counties, to Buchanan Dam	2	Change Limit Description
Dry Creek	Shasta County, reaches within Designated Floodways of Clear & Cottonwood creeks	2	Change Limit Description
El Capitan Canal	Merced County	2	Add to Table
Hutchinson Creek	Yuba County	2	Change County Location
Kern River, South Fork	Kern County, Isabella Dam to Tulare County Line	1	Change Limit Description
Kern River	Kern & Kings Counties	1	Change Limit Description
Mill Creek	Fresno County	2	Delete
Mill Creek	Tehama County, Sacramento River to Highway 99	2	Change Limit Description
Mill Creek	Tulare County	1	Delete
Morrison Creek	Sacramento to Franklin Boulevard	2	Change Limit Description
Paddy Creek & South Paddy Creek	San Joaquin County, to Tule Road	2	Add S. Paddy Creek
Red Bank Creek	Tehama County, only the reach that confluences with the Sacramento River Designated Floodway	2	Change Limit Description
Reeds Creek	Yuba County	2	Change County Location
Sheep Hollow Creek	Butte County	2	Add to Table

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